Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the Transfer	)	CC Docket No. 98-141
of Control of Licenses and Section 214	)	
Authorizations from Ameritech Corporation,	)	
Transferor, to SBC	)	

COMMENTS OF RHYTHMS NETCONNECTIONS INC.

Jeffrey Blumenfeld
Vice President and General Counsel
Rhythms NetConnections Inc.
6933 South Revere Parkway
Englewood, CO 80112
303.476.2222
303.476.5700 fax
<jeffb@rhythms.net>

Glenn B. Manishin
Christy C. Kunin
Stephanie A. Joyce
James R.J. Scheltema
Blumenfeld & Cohen – Technology Law Group
1615 M Street, N.W., Suite 700
Washington, D.C. 20036
202.955.6300
202.955.6460 fax
<glenn@technologylaw.com>

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SUMMARY

This proceeding surrounds the creation of the largest telecommunications monopoly since the breakup of AT&T. Perhaps as a result, the conditions fashioned by SBC in connection with its proposed merger with Ameritech are a flawed and anticompetitive implementation of the principles governing structural separation of telecommunications affiliates. Although they reflect a general awareness of the purposes of Section 272 of the Act, the proposed Merger Conditions have been drafted with the objective of maximizing SBC's ability to use its local monopoly power to disadvantage advanced service competitors and to impede DSL rivals from non-discriminatory access to essential monopoly network elements. The SBC proposal would largely nullify the Commission's considerable effort in the last year to adopt efficient, procompetitive and technologically neutral rules for advanced services.

This SBC "wish list" cannot be accepted by the Commission. As proposed by SBC, the Merger Conditions put the fox in charge of guarding the hen house — they are a recipe for disaster. The Commission should therefore reject the SBC proposal and impose competitively neutral conditions on the merger, such as those prepared by Rhythms and attached to these comments, that place SBC in the same position as its competitive rivals in the burgeoning advanced services marketplace. Only through the creation of this sort of strict regulatory parity can the Commission enable the rapid, competitive deployment of broadband services to all users in the SBC/Ameritech region.

The Merger Conditions start from several fundamentally flawed assumptions. *First*, they permit the SBC/Ameritech merger to close before any separate advanced services affiliates are established, instead of requiring the affiliates to be created and licensed prior to consummation of the transaction. *Second*, the Merger Conditions allow SBC to impose huge, non-cost justified

"Conditioning" fees on its DSL rivals – non-recurring charges that have been rejected by every state commission to have examined them – with no provision for imputation of similar charges into SBC's own DSL rates. *Third*, the proposed Merger Conditions permit SBC to refuse to offer "line sharing" capabilities to CLECs until, apparently at SBC's unilateral discretion, it is determined that line sharing is technically feasible and standardized equipment is available in commercial quantities. These limitations not only directly contradict the Commission's tentative conclusions in the pending *Further Notice* proceeding in CC Docket No. 98-147, but they allow SBC to provide the key component of residential advanced services, on an exclusive basis, for an indeterminate period after closure of the merger.

The Merger Conditions also include a large number of smaller provisions that, individually and collectively, deviate sharply from the principle that SBC's advanced services affiliate should be separate from its monopoly local exchange operations and should be subject to absolute parity in the provisioning of facilities, functionalities and information from the SBC LECs. These include:

- Permitting SBC too long a transition period for transferring retail advanced services to fully separate affiliates;
- Authorizing the SBC advanced services affiliates to enjoy preferential access to pre-ordering DSL "loop qualification" information;
- Failing to require SBC to tariff or offer the new collocation alternatives established in the Commission's recent March 1999 *Collocation Order;* and
- Allowing the SBC advanced services affiliates to share personnel, offices and other resources with the SBC LECs.

In sum, while the proposed Merger Conditions give lip service to the principles of structural separation, "the Devil is in the details." In their detailed implementation, SBC has crafted a set of proposed conditions with massive, unacceptable loopholes that completely undermine the purposes of Section 272 of the Act. Such an effort to emasculate corporate separation is inconsistent with the conclusion that the conditions make the proposed SBC/Ameritech merger in the public interest. If it approves the merger, the Commission can only do so by rejecting SBC's proposal and adopting alternative conditions, such as those prepared by Rhythms, that properly implement the structural separation mandates of Section 272 in the context of the broadband advanced services marketplace.

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ATTACHMENT 1 Rhythms' Proposed Alternative Merger Conditions

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COMMENTS OF RHYTHMS NETCONNECTIONS INC.

Rhythms NetConnections Inc.[1] and the ACI Corp. family of subsidiaries (collectively "Rhythms"), by their attorneys, submit these comments in response to Commission's *Notice* soliciting public comment on the Conditions proposed by SBC Communications, Inc. ("SBC") in connection with pending application for transfer of control of Ameritech Corporation ("Ameritech").[2]

This proceeding surrounds the creation of the largest telecommunications monopoly since the breakup of AT&T. The proposed Merger Conditions will govern, among other things, the manner in which a combined SBC/Ameritech would provide advanced telecommunications services and the details of SBC's post-merger relationship to its Digital Subscriber Line ("DSL") and other advanced service competitors. Yet, because the proposed Merger Conditions would

[1] Rhythms provides comprehensive networking solutions using high-speed data communications that combine local access through the deployment of, among other things, a range of xDSL technologies with capacity-balanced local and wide-area data networks. Rhythms began providing service in San Diego on April 1, 1998 and is currently operating in 15 major urban and suburban markets throughout the United States. Rhythms' subsidiary, ACI Corp., has state commission-approved interconnection agreements with every Regional Bell Operating Company ("RBOC") and other major ILECs. Rhythms has maintained an aggressive rollout of DSL services and is dedicated to bringing home the promise of competition in broadband services.

[2] Public Notice, DA 99-1305 (rel. July 1, 1999). By Public Notice released July 7, 1999, the Common Carrier Bureau extended the date for comments on the proposed Conditions until today. DA 99-1342 (rel. July 7, 1999). *See* Letter from Paul Mancini, SBC, and Richard Hetke, Ameritech, to Magalie Roman Salas, FCC, CC Docket No. 98-141 (filed July 1, 1999) ("SBC Letter") and "Proposed Conditions for FCC Order Approving SBC/Ameritech Merger" ("Merger Conditions") attached thereto.

directly and substantially undermine advanced services competition in the 13 states that will comprise the combined SBC/Ameritech, the Commission can approve the merger only by rejecting SBC's proposal and adopting alternative conditions, such as those prepared by Rhythms,[3] that properly implement the structural separation mandates of Section 272 in the context of the broadband advanced services marketplace.

INTRODUCTION

In April, Chairman Kennard told the CEOs of SBC and Ameritech that "the Communications Act requires that the Commission determine whether the proposed merger is in the public interest and, at this stage, I have serious concerns about whether your proposal satisfies this requirement."[4] In response, SBC has fashioned a set of conditions for its proposed merger with Ameritech that are a flawed and anticompetitive implementation of the principles governing structural separation of telecommunications affiliates. Although the conditions reflect a general awareness of the purposes of Section 272 of the Act, the proposed Merger Conditions have been drafted with the objective of maximizing SBC's ability to use its local monopoly power to disadvantage advanced service competitors and to impede DSL rivals from gaining non-discriminatory access to essential monopoly network elements.

The SBC Merger Conditions, which were heralded by some data CLECs as an appropriate regulatory response when announced by the Commission on June 29, have been executed in such an anticompetitive manner that, if approved, could destroy spell the most vivid competitive success of the 1996 Act—advanced data services. The Commission's Summary of June 29, 1999 indicated "the proposed conditions are intended to promote the public interest and benefit

[3] *See* Rhythms proposed Merger Conditions at Attachment 1. These proposed Merger Conditions include discrete sections that are meant to replace entirely their corresponding sections in the SBC proposed Merger Conditions.

consumers and competition."[5] Yet, the reality is that, as drafted by SBC, the actual conditions—unlike the Summary—come nowhere close. While the Commission Summary envisions equal treatment for all competitors and uniform operations support systems, the SBC conditions specifically allow SBC's affiliates *exclusive* rights to important functionalities and network equipment.[6] Rather than "treat[ing] the affiliate as they would any competitor,"[7] the proposed conditions provide such protracted implementation that the resulting transition period will likely be eclipsed by the three year "sunset" provision. In virtually every respect, SBC has proposed conditions that twist the simple, largely procompetitive positions articulated by the Commission into a set of self-serving, preferential entitlements.

SBC's assertion that "the Commission Staff has specifically indicated that the package of Conditions would satisfy their public interest concerns and lead them to support the proposed transfer of control"[8] is not and cannot be correct. The proposed SBC approach would largely nullify the Commission's considerable effort in the last year to adopt efficient, procompetitive and technologically neutral rules for advanced services. Even if Staff *ex parte* endorsement of the proposal were procedurally proper (which it would not be), the proposed Merger Conditions reflect the Staff's apparent policy concerns only in the broadest, most high-level sense. In other words, while the basic objectives of the Merger Conditions appear to reflect the public interest requirement of ensuring effective competition and nondiscriminatory conduct in advanced services, the detailed terms of the SBC proposal deviate so sharply from these basic principles that it

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[4] Letter from Chairman Kennard to Mr. Richard Notebaert, Chairman and CEO of Ameritech, and Mr. Edward Whitacre, Jr., Chairman and CEO of SBC Communications, CC Docket No. 98-141 (April 1, 1999).

[5] Summary of SBC/Ameritech Proposed Conditions, June 29, 1999, <http://www.FCC.gov/ccb/Mergers/SBC_Ameritech/conditions062999.html.

[6] Conditions ¶ 27.c.

[7] Summary of SBC/Ameritech Proposed Conditions, June 29, 1999, <http://www.FCC.gov/ccb/Mergers/SBC_Ameritech/conditions062999.html.

[8] SBC Letter at 2; *Id* at 5.

is inconceivable that the Bureau has already endorsed them. Instead, the details of the SBC proposal reveal very clearly that these are not a negotiated set of conditions meeting the Commission's public interest objections, but rather the unilateral proposal of minimally intrusive conditions – and in many instances provisions that conflict with both Section 272 and settled Commission rules – that SBC hopes to sneak through in the merger approval process.

This SBC "wish list" simply cannot be accepted by the Commission. As proposed by SBC, the Merger Conditions put the fox in charge of guarding the hen house — they are a recipe for disaster. The Commission should therefore reject the SBC proposal and impose competitively neutral conditions on the merger, such as those prepared by Rhythms and attached to these comments, that place SBC in the same position as its competitive rivals in the burgeoning advanced services marketplace. In addition, Rhythms believes that the Commission should establish a public forum to elucidate application of these requirements in order to eliminate post-merger confusion among both SBC and CLECs as to the precise requirements of the conditions and to avoid lengthy litigation such as that surrounding the Bell Atlantic-NYNEX merger conditions. Only through the creation of this sort of strict regulatory parity can the Commission enable the rapid, competitive deployment of broadband services to all users in the 13-state SBC/Ameritech region.

I. THE PROPOSED MERGER CONDITIONS IMPROPERLY ALLOW SBC TO CLOSE THE MERGER BEFORE A SEPARATE AFFILIATE STRUCTURE IS ACTUALLY IN PLACE

The proposed Merger Conditions start from several fundamentally flawed assumptions. First, and most importantly, they permit the SBC/Ameritech merger to close before any separate advanced services affiliates are established, instead of requiring the affiliates to be created and licensed prior to consummation of the transaction. This basic error — compounded in the re-

sulting Merger Conditions that fashion an extended "transition" period during which the SBC affiliates are allowed preferential access to network facilities, information and LEC resources — dooms the SBC proposal. The result of these flaws is that SBC could operate as an integrated company to provide advanced services with no real separation for an extended period, leveraging its existing loop monopoly to foreclose advanced services data competition.

Rather than rubber-stamping the proposed conditions, the Commission instead should adopt a "fix it first" approach and require SBC to finalize its separate affiliate structure in accordance (at a minimum) with the Commission's existing corporate separation rules,[9] including all regulatory approvals, interconnection agreements and personnel/facilities transfers, *before* it approves the SBC/Ameritech merger. This "fix-it-first" approach is consistent with the general practice of the Department of Justice in reviewing Hart-Scott-Rodino Act mergers. There, the DOJ has made clear that, unless in "exception situations," it will "insist upon the elimination of competitive overlaps before an acquisition is consummated."[10]

Many of the issues of discriminatory preferences and anticompetitive ability discussed throughout these comments would be resolved or mitigated if true and complete separation between SBC and its advanced services affiliates were required as a precondition to merger. For example, the issues related to joint marketing and operations disappear when a fully separate affiliate is made responsible for providing advanced services. Similarly, the issue of access to loop information and OSS systems is, in large part, mitigated by the 1996 Act's nondiscrimination requirements when SBC is forced to form a wholly separate affiliate. Were SBC required to

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[9] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, Report and Order, CC Docket 99-149, 11 FCC Rcd. 21,905 (1996) ("*Non-Accounting Safeguards Order*").

[10] U.S. Department of Justice, Press Release (Feb. 22, 1982) re: acquisition of MCIC Investment Corp. by Baldwin-United Corp.; U.S. Dept. of Justice, Press Release (April 16, 1982) re: merger of Stroh Brewery Co. and

form separate affiliates rules as a precondition to merger, all the Commission would essentially need to do is require SBC to treat all CLECs in the same manner that it serves its own affiliates.

If approval of — rather than merely filing for — regulatory authority were a merger prerequisite, customer confusion could be avoided. In fact, all the problems associated with the transition period would disappear: its uncertain duration, the differences in time between availability to customers in different states, the discriminatory provisions specifically (or implicitly) allowed, and the murkiness of the actual implementation of the transfer.[11] The entire process would be simpler. Once there was full compliance by SBC for a truly separate advanced services subsidiary in each state where the applicant serves as an ILEC, they would be eligible for merger approval. It also spares the Commission the burdens of tracking compliance by the applicants during the transition period. Further, this "fix it first" approach provides incentives for the applicants to comply in advance, rather than forcing the Commission to enforce Merger Conditions after approval has been granted, and exposing the Commission to protracted enforcement proceedings such as those resulting from the Bell Atlantic-NYNEX merger.[12]

Instead of a simple process, the Merger Conditions provide unnecessary complexity and opportunities for SBC and its affiliate(s) to act anticompetitively. In fact, because it does not favor SBC to set up structurally separate affiliates before closing the merger, the SBC proposal not only permits, but rather invites, discrimination and post-merger anticompetitive conduct by the SBC/Ameritech ILECs.

Jos. Schlitz Brewing Co. ("[w]here the problem can be cured... the Antitrust Division will insist that it be cured prior to consummation.").

[11] *See* Section IV(A), below.

[12] *Applications of NYNEX Corporation and Bell Atlantic Corporation*, NSD-L-96-10, Memorandum Opinion and Order (rel. Aug. 14, 1999).

II. THE PROPOSED MERGER CONDITIONS INCLUDE EXORBITANT LOOP CONDITIONING CHARGES THAT ARE ANTICOMPETITIVE, NON COST-JUSTIFIED AND COMPLETELY UNNECESSARY

A second basic flaw in the SBC proposal is that it would allow SBC to impose huge, non-cost justified "conditioning" fees on its DSL rivals – non-recurring charges that have been rejected by every state commission to have examined them – with no effective provision for imputation of similar charges into SBC's own DSL rates. In its Summary of the proposed Conditions, the Commission stated that "SBC-Ameritech will offer uniform cost-based prices for conditioning xDSL loops." Yet, the Merger Conditions require a uniform national fee for xDSL loop conditioning that could total $4,620 in nonrecurring charges per loop.[13] This proposal has no cost basis and is blatantly discriminatory. Its sole purpose if for SBC to achieve at the federal level a competitive advantage in the emerging advanced services marketplace that it has been unable to secure from state commissions.

No state commission has ever approved nonrecurring charges for loop conditioning from an ILEC. Indeed, Connecticut just two weeks ago resoundingly rejected SBC's amended loop tariff, one provision of which included conditioning charges of up to $1,800.[14] In place of the tariff, Connecticut ordered SBC to submit a revised tariff that completely omits all loop conditioning charges.[15]

Moreover, the proposed conditioning charges are improper in the cost-based, forward-looking environment of the 1996 Act. According to the Commission, all nonrecurring charges

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[13] *See* proposed Merger Conditions, Attachment C. Removal of Repeaters = $360 x 3; Removal of all Bridged Taps (conservatively used one instance) $600; Removal of all Load Coils = $980 x 3.

[14] Docket No. 98-11-10, Application of ACI Corporation for an Advisory Ruling on the Southern New England Telephone Company's Provision of Unbundled Loops to Competitive Local Exchange Carriers, Letter Order (July 8, 1999).

[15] *Id.*

must comply with Total Element Long Run Incremental Cost ("TELRIC") pricing rules.[16] The Eighth Circuit has reinstated all TELRIC rules[17] pursuant to the Supreme Court's remand in *Iowa Utilities Board v. FCC*.[18] According to these rules, all rates associated with provisioning UNEs must "recover the forward-looking costs directly attributable to the specified element."[19]

There is no evidence, let alone even an assertion in the Merger Conditions, that these conditioning rates are cost-based, let alone forward-looking. In large part, the electronics that are removed through "conditioning" exist as a result of substandard network deployment by the ILECs. These electronics are relics of an earlier age in telephony when telephone customer premises equipment was not sophisticated enough to amplify weak signals. In those times, electronics were required on loops in order to keep signal strength high enough for people to hear each other. This age has passed. Data CLECs should not be forced to pay in order to ameliorate the inefficient LEC investments in legacy networks. Costs for obsolete historic deployment practices must not be recovered by ILECs in UNE rates. Therefore, xDSL loop conditioning fees should neither be imposed by the SBC nor sanctioned by the Commission.

The proposed SBC conditioning charges will render data CLECs virtually unable to recover their costs of provisioning if such conditioning charges are adopted. Even if there was a requirement for SBC to impute the associated conditioning costs (which there is not), it has the luxury of decades of monopolist telephony revenues to subsidize its DSL services. Further, if SBC chooses to impose these charges to the retail operations of its theoretical eventual affiliates, the lax separations requirements proposed in the Merger Conditions permit SBC to cross-subsi-

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[16] "Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost providing the applicable element." 47 C.F.R. § 51.507(e).

[17] *Iowa Utils. Bd. v. FCC*, Cases No. 96-3321 et al., Order (June 10, 1999).

[18] 118 S. Ct. 721 (1999).

[19] *First Report and Order*, 11 FCC Rcd. at 15,847 ¶ 682.

dize the affiliate in order to cover these charges. Thus, data CLECs would be disadvantaged to the tune of $4,620 per customer in attempting to provide end user DSL services. The effects of this disadvantage on advanced services competition are obvious and significant.

The Commission should eliminate all loop conditioning charges from the proposed Merger Conditions. Like Connecticut, the Commission should require that SBC provide DSL-capable loops to both its advanced services affiliates and competing data CLECs with no recurring or non-recurring charges for loop "conditioning." Only then will advanced services competitors be able to compete on a level regulatory playing field with the SBC advanced services affiliates.

III. THE PROPOSED MERGER CONDITIONS FOR PROVIDING LINE SHARING ARE BLATANTLY ANTICOMPETITIVE AND VIOLATE THE CLEAR MANDATES IN SECTION 251 OF THE 1996 ACT

A third basic flaw in the proposed Merger Conditions is that they permit SBC to refuse to offer "line sharing" capabilities to CLECs until, apparently at SBC's unilateral discretion, it is determined that line sharing is technically "feasible" and standardized equipment is available in "commercial quantities". These limitations not only directly contradict the Commission's tentative conclusions in the pending *Further Notice* proceeding in CC Docket No. 98-147, but they allow SBC to provide the key component of residential advanced services, on an exclusive basis, for an indeterminate period after closure of the merger.

Line sharing is a valuable functionality for data CLECs seeking to deploy DSL services to residential markets. SBC and Ameritech appear to acknowledge this point by agreeing to provide line sharing to competitors prior to federal Commission mandate. Nonetheless, the terms for provisioning line sharing are unacceptable because they blatantly discriminate against unaffiliated data CLECs and include novel — and largely unenforceable — legal preconditions that

neither Congress nor the Commission ever envisioned. In addition, the Merger Conditions' proposed rate structure and use restrictions on line sharing create a confused regulatory regime that permits double-recovery by SBC.

A. The Merger Conditions Cannot Grant Line Sharing to the SBC Advanced Services Affiliates to the Exclusion of Competing Data CLECs

The Merger Conditions inexplicably allow SBC to provide line sharing on an exclusive basis for a period that it deems fit. The conditions propose that SBC may "provide the DSLAM functionally [*sic*] of interim line sharing to the separate Advanced Services affiliate(s) on an exclusive basis until it becomes both technically and commercially feasible to provide such capability to all providers."[20]

In Paragraph 33, the Merger Conditions state that technical feasibility will be determined according to the Commission's *Advanced Services FNPRM*.[21] Paragraph 33, however, also defines "commercially feasible" as when "the equipment to provide such line sharing becomes available, based on industry standards, at commercial volumes." That provision does not indicate who the final arbiter of commercial feasibility will be; the clear implication is that this matter is left to SBC's sole discretion. Entrusting such determinations to incumbents is dangerous, because, as the Commission has recognized, ILECs have the power to stifle development of technology related to advanced services,[22] including line sharing. The grant to SBC affiliates of exclusive access to line sharing until SBC itself deems it "feasible" ("financially safe" would be a better term) to give line sharing to CLECs is simply outrageous.

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[20] Conditions ¶ 27.c.

[21] Conditions ¶ 33.

[22] "[I]ncumbent LECs should not unilaterally determine what technologies LECs, both competitive LECs and incumbent LECs, may deploy. Nor should inumbent LECs have unfettered control over spectrum management standards and practices. We are persuaded by the record that allowing incumbent LECs such authority may well stifle deployment of innovative competitive LEC technology." *Deployment of Advanced Wireline Services Offering*

The SBC proposal is also an open invitation to protracted litigation disconcerting because the phrase "commercially feasible" is subject to differing interpretation—without any objective standards or reference. For instance, "commercially available" to the LEC may mean that provision of line sharing yields a positive margin; to the Commission it may mean that provision does not place universal service obligations at risk. And to a CLEC it could mean they are willing to provide line sharing currently at a loss in order to build a sufficient customer base. In order to avoid the resulting confusion, the Commission should reject SBC's proposed line sharing provision and instead require SBC-AIT to provide line sharing immediately in any region in which it offers advanced services, and at the latest, by the closing date of the Ameritech merger.

B. The Pricing Standards Proposed for Line Sharing Give SBC an Unlawful Windfall

The proposed Merger Conditions set pricing rules for line sharing that allow SBC to charge rates grossly in excess of its costs. These "Surrogate Line Sharing Charges" comprise 50 percent of SBC's lowest monthly recurring charge for a loop plus 100 percent of SBC nonrecurring charges for a loop.[23] In fact, the Merger Conditions emphasize that "there is no discount for non-recurring charges."[24] These charges in no way approach a "discount." Rather, they permit SBC to recover nearly double the costs of provisioning line sharing in violation of the most crucial pricing precept of the 1996 Act: that all charges for network elements be cost-based.

SBC already provides line sharing to itself for its own retail DSL services. The loops it uses have been installed in the network for voice services for years and have been fully depreciated or reimbursed via customer pass-through long ago. Thus, SBC's incremental cost of providing data services over an existing and operational voice grade loop are zero. The Merger

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Advanced Telecommunications Capability, CC Docket No. 98-147, Further Notice of Proposed Rulemaking ¶ 63 (rel. _____, 1999) ("*Advanced Services FNPRM*").

[23] Conditions ¶ 34b.

Conditions ignore this key fact and instead guarantee that SBC will receive an additional monthly charge, as well as, the full nonrecurring loop costs, from CLECs that engage in the very same line sharing that SBC enjoys. These pricing rules flatly violate Congress's mandate in Section 251 that all elements used to provide local telecommunications services be provided "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[25] Moreover, they violate the Commission's rule that "the price of a network element should include the forward-looking costs that can be attributed directly to the provision of services using that element."[26]

The fact that the Merger Conditions appear to impose identical line sharing charges on SBC's advanced services affiliates does not cure this problem. As demonstrated below, the separations rules proposed in these Merger Conditions leave ample opportunity for cross-subsidization. Thus, any SBC affiliate could in some manner recover any line sharing charges that it ostensibly would pay. Data CLECs would thus be greatly disadvantaged by paying above-cost rates for a facility that its SBC-AIT affiliate competitors receive for free. The Commission should not permit these substantially anticompetitive effects to become a reality.

The pricing of line sharing is presently the subject of Commission review in the *Advanced Services* docket.[27] These conditions, if approved by the Commission, would be an unfortunate harbinger of the fate not of only line sharing rates but of the entire functionality. As Rhythms has demonstrated in its initial comments in the *Advanced Services* docket, "[t]he nondiscriminatory requirements of the 1996 Act mandate that ILECs treat data competitors indistinguishably from the way they treat themselves. *For example, Bell Atlantic has indicated that it*

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[24] *Id.*

[25] 47 U.S.C. § 251(c)(3) (1996).

[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, 11 FCC Rcd. 15,499, 15,673 (1996) ("*Local Competition Order*").

[27] *Advanced Services FNPRM* ¶ 106.

imputes loop costs of $0.00 to its retail DSL services; its competitors should not be forced to pay more than that."[28] The Merger Conditions should reflect this pricing requirement for line sharing.

C. The Proposed Restrictions on Line Sharing Invite Confusion and Anticompetitive Behavior

The Merger Conditions include a provision relating to the proper use of line sharing--specifically that CLEC line sharing services adhere to SBC's own spectral map as defined in SBC Technical Publication TP-76730.[29] Requiring data CLECs to conform their advanced services to SBC's Technical Publication strictures is a blatant attempt by SBC unilaterally to define industry standards. The Commission has already stated that "LECs should not unilaterally determine what technologies LECs, both competitive LECs and incumbent LECs, may deploy. Nor should incumbent LECs have unfettered control over spectrum management standards and practices."[30] SBC's proposal that CLECs using line sharing adhere to SBC's parochial view of how DSL service should be is in flagrant contravention of this Commission rule. The Commission should strike this condition on CLEC line sharing and unequivocally require SBC to permit line sharing wherever technically feasible.

IV. SBC'S ADVANCED SERVICES AFFILIATES MUST BE COMPLETELY SEPARATE FROM THEIR MONOPOLY LEC OPERATIONS AND MUST BE SUBJECT TO ABSOLUTE PARITY IN THE PROVISIONING OF FACILITIES, FUNCTIONALITIES AND INFORMATION FROM THE SBC LECs

Nothing in the Commission's Summary indicates that there should be *any* period of preferential treatment for the SBC advanced services affiliate. Indeed, the Commission states SBC "will treat the affiliate as a competitor" and that the affiliate "will operate independently." As

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[28] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of Rhythms NetConnections Inc. at 13 (June 15, 1999).

[29] Conditions ¶ 34.c. & d.

proposed by SBC, however, these principles are almost entirely eviscerated. The Merger Conditions include a large number of smaller provisions that, individually and collectively, deviate sharply from the principle that SBC's advanced services affiliate should be separate from its monopoly local exchange operations and should be subject to absolute parity in the provisioning of facilities, functionalities and information from the SBC LECs. These include:

- Permitting SBC too long a transition period for transferring retail advanced services to fully separate affiliates;[31]
- Authorizing the SBC advanced services affiliates to enjoy preferential access to pre-ordering DSL "loop qualification" information;[32]
- Failing to ensure enforcement of the new collocation alternatives established in the Commission's recent March 1999 *Advanced Services Order*; and
- Allowing the SBC advanced services affiliates to share personnel, offices and other resources with the SBC LECs.[33]

In short, while the proposed Merger Conditions give lip service to the principles of structural separation, "the Devil is in the details." In their detailed implementation, SBC has crafted a set of proposed Conditions with massive, unacceptable loopholes that completely undermine the purposes of Section 272 of the Act. Such an effort to emasculate corporate separation is directly inconsistent with the conclusion that the Conditions make the proposed SBC/Ameritech merger

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[30] *Advanced Services FNPRM* ¶ 63.

[31] In contrast to merger approval, which relies on *regulatory filings* (Conditions ¶ 29.a. and ¶ 29.b.), the transition period for transferring retail advanced services to fully separate affiliates hinges on receipt of regulatory *approval*. *See*, *e.g.*, *id.* ¶¶ 31.d. and 31.e.

[32] Electronic pre-order OSS access to loop pre-qualification will only become available *beginning* 12 months after the Merger Closing Date. Conditions ¶ 22. This unacceptable delay in access to the loop make-up database is even worse in Connecticut and Nevada, where it will be made available on a phased in basis by no later than 22 months after the Merger Closing Date. *Id.* ¶ 21.b. In the meantime, SBC's retail arm is allowed to share information and jointly market. *Id.* ¶ 27.c.

[33] Conditions ¶ 27.a. through d.

in the public interest. If it approves the merger, the Commission can only do so by rejecting SBC's proposal and adopting alternative conditions, such as those prepared by Rhythms, that properly implement the structural separation mandates of Section 272 in the context of the broadband advanced services marketplace.

A. The Proposed Open-Ended "Transition" Provisions Are Improperly Long and Allow SBC to Enjoy Substantial, Unfair Competitive Advantages in the Advanced Services Marketplace

Unless its adopts the "fix it first" approach recommended by Rhythms in Section I of these comments, the Commission must substantially amend the proposed Merger Conditions in order to provide a rapid and complete transition of advanced services to structurally separated SBC affiliates. The proposed Merger Conditions describe such a ponderous, protracted transition period, and include such great opportunity for anticompetitive behavior, that the separate affiliate requirement is rendered altogether meaningless.

Although well intentioned, the proposed rules calling for a separate subsidiary are ineffective and provide regulatory "cover" for discriminatory practices. *First*, they provide that the requirements contained in the Merger Conditions will last no longer than three years.[34] *Second*, the Merger Conditions permit SBC to continue providing advanced services in all of its states for a lengthy period of time[35] and to retain its advanced services customers for an even longer period.[36] *Third*, the "transition" period for the eventual transfer of advanced services retail operations to the affiliate is of an uncertain duration and retains little Commission oversight of its implementation.[37] *Finally*, once the affiliate becomes operational as a retail entity, the Merger Conditions provide little safeguards to ensure arm's length dealing, and specifically lack prohi-

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[34] Conditions ¶ 39.a.

[35] Conditions ¶ 31.

[36] Conditions ¶ 31.e. (regarding transfers of operations for existing non-ISP DSL customers).

bitions on cross-subsidization between parent and affiliate. These deficiencies are substantial and obviate the objective of creating affiliates in the first instance.

The ability of SBC to offer advanced services through its ILEC retail operations ensures continuation of an ILEC-dominated market that resists providing innovative advanced services until compelled. Rather than cater to SBC concerns where SBC is requesting to gain an even greater monopoly footprint, the Commission should prescribe controls to assure that the competitive market is allowed to flourish. In contrast, many of the proposed Merger Conditions provide for specific exemption from what would otherwise be deemed discriminatory practices under the minimal rules currently governing affiliate transactions. The transition period during which customers are transferred to subsidiary CLECs is uncertain, but at best too lengthy. Moreover, the CLEC operations do not have regulatory strictures sufficient to prevent such basic anticompetitive practices as cross subsidies from regulated services.

1. The Merger Conditions foretell the rapid expiration of the affiliate separation requirement

The Merger Conditions provide for a quick expiration of the requirement that all advanced services be provided through an affiliate. Indeed, the most unequivocal of all the Merger Conditions' terms is the certainty that they expire. Specifically, the SBC requirements to provide advanced services via a separate affiliate sunset upon either (1) three years following the merger closing date, (2) enactment of legislation abolishing the separate subsidiary requirement[38] and when the FCC changes its rules (presumably in response to such legislation) or, (3) issuance of a

[37] Conditions ¶ 31.f.

[38] As the Commission may be aware, both the House of Representative and the Senate are considering legislation that will immediately de-regulate ILEC provisioning of advanced services, which would preclude a separate subsidiary requirement. *See* S.1043, "Internet Regulatory Freedom Act of 1999"; S.877, "Broadband Internet Regulatory Relief Act of 1999." SBC is in all likelihood among the ILECs that are actively supporting this legislation.

final, non-appealable judgment of a court.[39] More broadly, the proposal contains an additional sunset provision four years from the closing date, after which SBC can cease offering line sharing to competitors,[40] end the OSS line sharing discount,[41] stop performing loop qualification,[42] and stop providing enhanced OSS.[43] As diluted and ineffective as the proposed Merger Conditions are, they are certain to end, leaving little protection to SBC's competitors.

Moreover, the proposed Merger Conditions envision a transition period during which SBC can create affiliates to provide advanced services and a transfer of customers currently obtaining advanced services from the SBC LECs to the resulting affiliate.[44] The length of this transition period is open-ended and uncertain. In part this arises because the transition period relies on SBC compliance with the requirements for creating separate affiliates.[45] SBC could, for example, apply today for an affiliate to receive regulatory authority to provide advanced services, or alternatively it can delay creation of the affiliate(s) until absolutely necessary to comply with the Merger Conditions. Similarly, such affiliate could begin negotiation of an interconnection agreement immediately. Preliminary drafting of advanced services tariffs could also begin.

Thus, much of the timing necessary to effect the merger conditions is solely under the control of SBC. In contrast, if the imposition of the creation and approval of the affiliate, the negotiation and approval of an interconnection agreement and the filing and approval of a tariff were merger preconditions, neither the CLECs nor the Commission would be subject to SBC's

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[39] *See* Conditions ¶¶ 39.a. through c.

[40] *See id*. ¶¶ 33, 34.

[41] *See id*. ¶ 35.

[42] *See id*. ¶¶ 21-24.

[43] *See* Conditions ¶ 16.

[44] Conditions ¶ 31.f.

[45] The timing of the transition period is dependent first upon negotiation and approval of affiliate interconnection agreements and secondly upon SBC compliance with the customer activation rules in Paragraph 31.b. and 31.d. Conditions ¶ 31.f.

timing preferences. If the Commission chooses not to make such requirements preconditions to merger approval, it surrenders its leverage, *i.e.*, the incentive of the joint applicants to obtain merger approval.[46]

As currently proposed, there are several conditions precedent to merger approval: the joint applicants must file for authority to provide services through their affiliate(s), and execute and file an interconnection agreement. Notably, the conditions do not require regulatory *approval* for either of these merger-preconditions, merely that filings be made. Where SBC has merger approval as an incentive, the process for seeking and receiving approvals would likely be accelerated.

2. The transition provisions permit continuation of SBC's exclusionary conduct directed against advanced services competitors

The transition provisions of the proposed Merger Conditions allow SBC to continue its documented pattern of unlawful, exclusionary conduct directed against competitive DSL providers and other data CLEC competitors. The result of the protracted transition period would be to ensure that the advanced services affiliate had an unfettered ability to leverage the monopoly control of the ILEC into the advanced services markets. Under SBC's approach, its advanced services affiliate(s) would receive preferential treatment with respect to equipment availability (*e.g.*, exclusive right to certain functionality associated with network equipment used specifically to provide advanced services),[47] OSS access (*e.g.*, access to CPSOS which is available only on a functionally equivalent basis to other CLECs),[48] exclusive rights to ILEC branding (*e.g.*, trade-

[46] Although the joint applicants are required as a merger pre-Condition to offer advanced services through one or more affiliate(s), the ILEC is allowed to simultaneously offer advanced services *competing with its own affiliate*. *See* Conditions ¶ 25.

[47] Conditions ¶ 27.a. & .c.

[48] Conditions ¶ 27.a.

marks, service marks, etc.),[49] joint marketing and customer lists,[50] and other data unavailable to other CLECs.

Rather than circumscribing SBC's advanced services affiliates, these transition provisions instead allow SBC to grant exclusive and preferential treatment to its own advanced services for an open-ended period. Permitting simultaneous service offerings by SBC and its affiliates is far more damaging than merely confusing the public. The simultaneous existence of enables SBC and its affiliated services permits the post-merger companies to (a) serve customers directly while simultaneously developing a customer base for the affiliate, (b) provide invaluable data regarding prospective customers to the CLEC which is unavailable to competitors, (c) enable the affiliate to use equipment unavailable to CLECs, and, (d) provides for database access to OSS systems unavailable to CLECs. In short, it allows for discrimination between the SBC and its affiliate *vis-a-vis* other CLECs and provides a convenient way for the ILEC to transfer its management and technical knowledge base, customer lists, equipment and capital without recompense or sufficient oversight. (Worse, many of these advantages continue past the transition phase to become permanent entitlements of the affiliate.)

More egregious is the opportunity afforded the applicants to continue discriminatory behavior as an ILEC or in the ILEC relations with their advanced services affiliate. For example, the conditions provide that "the employees of the incumbent LEC may only access the incumbent LEC's loop pre-qualification information through the same OSS as are made available to CLECs, except that for a period of 6 months following the Merger Closing Date the employees of the incumbent LEC may access CPSOS, which is only available on a functionally equivalent

[49] Conditions ¶ 27.d.

[50] Conditions ¶ 27.d.

basis to CLECs as described in Paragraph 16."[51] What this means is that SBC affiliates will have superior access to facility information that is absolutely essential data CLECs' ability to provide advanced services. This superior access will place data CLECs at a significant competitive disadvantage in providing advanced services.

Access to loop qualification databases is but one example of provisions that allow SBC to continue its pattern of anticompetitive conduct toward data CLECs. Equally important is that "[t]he incumbent LEC and Advanced Services affiliate(s) may separately own facilities or network equipment used specifically to provide Advanced Services" and that "certain functionality associated with this equipment may be provided to the separate Advanced Services affiliate *on an exclusive basis* during a transitional period."[52] In addition, the incumbent LECs may provide "the DSLAM functionally [sic] of interim line sharing to the separate Advanced Services affiliate(s) on an exclusive basis until it becomes both technically and commercially feasible to provide such capability to all providers, as described in Paragraph 33."[53] As a result, there is no "true" separation during the prolonged transition period.

The transition period allows information sharing between the LEC and the affiliate in a number of significant ways. SBC and its affiliates are allowed to jointly market services.[54] The conditions should, but do not, contain proscriptions barring SBC from subsidizing the affiliate's marketing costs. Indeed, the Merger Conditions specifically permit the affiliate to "use the in-

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[51] *See* ¶ 27.a.

[52] "Advanced Services Equipment" includes: "(1) DSLAMs or functionally equivalent equipment, (2) splitters located tat the customer premises that are used in the provision of Advanced Services, (3) packet switches and multiplexers such as ATMs, Frame Relay engines and Packet Engines used to provide advanced services, (4) modems used in the provision of packetized data, and (5) DACS frames used in the provision of Advanced Services." *See id.* ¶ 27.c.

[53] *Id.*

[54] *See id.* ¶ 27.a.

cumbent LECs' name, trademarks, or service markets on an exclusive basis."[55] Not only are the addresses and other information available to the affiliate, but the customer contact personnel (*i.e.*, the telephone services decision-makers at the customer premises) are shared. To compound the problem, the affiliate can use SBC's sales force to market advanced services on its behalf.

The opportunity for information sharing is not restricted to marketing. In fact, the customer service operations (such as billing and business office), or maintenance and service related issues can be handled by the LEC as the Conditions are currently structured.[56] Moreover, the proposed conditions are drafted so broadly that what is permitted as "joint marketing" in fact allows numerous coordinated joint activities that extend beyond marketing. This is an example of how, as drafted, the exceptions swallow the rule. Crucial customer data, such as identification and usage records, which are invaluable in marketing, are also available to the affiliate during the transition period, without any regard for privacy of the rate base value of the customer data. Such preferential marketing treatment (*i.e.*, joint marketing with the LEC) and preferential access to customer data advances the interests of the LEC and its affiliate(s) and skews the competitive landscape in their favor.

Instead of providing a convenient means of transferring assets and manpower without restriction between the entities, the Commission must mandate full separation immediately upon merger. The resulting affiliates must then be in the same position as other CLECs when offering advanced services, *i.e.*, there should be no disparate treatment between the SBC's affiliate and CLECs either with the availability and furnishing of collocation and equipment placement, access to ILEC services and databases (both loop provisioning, ordering and customer databases) or pricing. Immediate, full separation is the most effective way the Commission can promote a

[55] *See* Conditions ¶ 27.d.

competitive market for advanced services. Full separation contemplates separate employees, at the affiliate's own site, with access to SBC's databases and network elements identical to that afforded CLECs.

Anything less than full separation (where SBC and its affiliate deal with each other at arms-length) creates an environment conducive to anticompetitive behavior on the part of the monopoly (and its affiliate). It is precisely the natural proclivity of monopoly behavior to act anticompetitively that compels Rhythms to advocate creation of *truly separate* affiliates and satisfaction of *all* regulatory prerequisites by such affiliates to provide service as a merger *precondition*, rather than rely on post-merger compliance by the joint applicants.

B. The Proposed Merger Conditions Allow SBC to Maintain Preferential Access to Essential "Loop Qualification" Information and OSS Functionality

The Merger Conditions fail to ensure adequate and nondiscriminatory access to xDSL-compatible loops information and OSS interfaces that are essential to competition in advanced services. The Merger Conditions must require SBC to provide comprehensive information regarding the physical characteristics of xDSL loops on a real-time basis. Additionally, the Commission should adopt simple and precise rules for OSS provisioning that provide data CLECs with fully automated, electronic interfaces for maximum efficiency in pre-ordering, ordering, provisioning and facility maintenance.

1. Loop qualification information

As the Commission has recognized, access to information regarding the physical characteristics of a copper loop is essential to the ability of data CLECs to provide DSL services. In its August 7, 1998 Order, the Commission stated that "[i]f new entrants are to have a meaningful

[56] *See* ¶ 27.b. In addition, joint marketing permits either parent or sub to deal with "customer care, such as service representative interaction with customer after the sale." Conditions ¶ 27.a.

opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services."[57] Although the proposed Merger Conditions include provisions requiring SBC to make loop information available to its DSL competitors, they are subject to unnecessarily protracted deadlines that give SBC and its affiliates significant competitive advantage in providing DSL services.

Though they purportedly give unaffiliated CLECs "nondiscriminatory" access to loop information,[58] the proposed Merger Conditions clearly do not provide for parity of access to the loop information that SBC itself presently enjoys for its own retail DSL services. In order to determine whether a specific loop is capable of supporting DSL service, a CLEC must know several physical characteristics of the loop. These include: loop length, loop gauge (the thickness of the loop), presence of load coils, DAMLs, repeaters and bridged taps, and whether any portion of the loop is served by digital loop carrier ("DLC"). Moreover, the CLEC must know all of this information at the time it offers services to any specific customer. Without such access to loop information, CLECs must engage in a game of "go fish" to find and obtain xDSL-capable loops, thus suffering significant competitive disadvantage against ILEC retail DSL service machines. CLECs therefore should be guaranteed access to loop information on a real-time, fully automated basis at the preordering stage of provisioning services. SBC has in fact developed and maintained a loop information database that gives its own retail DSL sales staff fully automated access to all necessary loop information in real time while a potential customer is on the line.

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[57] *Deployment of Advanced Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order, FCC 98-188 ¶ 56 (rel. Aug. 7, 1998) ("*Advanced Services MO&O*").

[58] Conditions ¶¶ 21&22.

The Merger Conditions should, as a matter of basic nondiscrimination, provide CLECs with parity of access to such information.

The proposed Merger Conditions presently require SBC to provide unaffiliated CLECs with loop information only as to the length of specific loops, "on an individual address basis," on or prior to the merger closing date.[59] For the Ameritech states as well as Connecticut and Nevada – seven states in all – however, loop length information must not be provided until 22 months after the closing date.[60] Moreover, this information will indicate only whether the loop is less than 12,500 feet, is between 12,000 and 17,500 feet, or is more than 17,500 feet in length. Thus, at best, and only in SBC states, CLECs will be able to find out which length category a specific loop falls into. This provision provides one-seventh of the information without which CLECs cannot complete a viable xDSL loop order.

As to the remaining information on loop characteristics, the Merger Conditions require SBC to provide "nondiscriminatory, electronic pre-order Internet access" to loop information.[61] The information must not be available to CLECs until *beginning* 12 months after the closing date.[62] Because SBC already has real-time access to comprehensive loop information, the delay in providing competitors such access is plainly discriminatory. In another provision, the Merger Conditions require SBC to provide, either by electronic or non-electronic means, "loop qualification information" that includes the loop length category and the presence of load coils, repeaters and bridged taps.[63] With this provision, CLECs obtain four-sevenths of the loop information that they require. This requirement has, however, no specified deadline for implementation. It

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[59] Conditions ¶ 21a&b.

[60] Conditions ¶ 21b.

[61] Conditions ¶ 22.

[62] *Id.*

[63] Conditions ¶ 23.

seems that CLECs are simply to trust that the information will at some time be available to them. These absent deadlines are particularly troublesome in light of the sunset of the conditions. Consider that under the proposed conditions SBC will not provide data to competitors that its retail arm currently receives until over two years from now. The conditions' failure to require data competition with the more detailed information will likely not occur prior to the sunset.

The Commission must amend these requirements to state the SBC must, by the closing date, provide truly nondiscriminatory access to all of the loop information listed above. Because SBC for months now has enjoyed such access itself through real-time, fully automated databases, CLECs must have equal access to these databases. If SBC is permitted to continue providing inadequate loop information to its data CLEC competitors, it will guarantee that these CLECs suffer extreme delay in obtaining xDSL-capable loops while SBC goes about cornering the residential and business DSL markets. The Commission must not allow SBC to disadvantage data CLECs in this manner for even one day after consummation of the SBC/Ameritech merger.

2. OSS access requirements

The proposed Merger Conditions do not provide data CLECs with immediate, sufficient or lasting access to SBC's OSS functionality. This OSS access is crucial to viable entry into the telecommunications market, be it voice telephony or advanced services, because only with OSS interfacing can carriers perform pre-ordering and ordering functions to the scale and speed requirements to serve customers efficiently. Indeed, the Commission has recognized from the inception of the Local Competition proceeding that "it is absolutely necessary for competitive carriers to have access to operations support systems functions in order to successfully enter the local service market."[64]

[64] *Local Competition Order*, 11 FCC Rcd. at 15,766 ¶ 521.

The OSS provisions in the proposed Merger Conditions are inadequate in two significant respects. *First*, they allow SBC such a protracted timeline for compliance that, incredibly, the Merger Conditions will expire before CLECs obtain access to SBC OSS interfaces. *Second*, the Merger Conditions again grant SBC affiliates early and discriminatory access to OSS interfaces. Rhythms therefore proposes that the Commission simply require SBC to give all CLECs operating in its thirteen states immediate access to the best OSS interfaces presently available by either company and, if these interfaces are not fully automated EDI interfaces, to develop such OSS functionality within six months of the closing date. By simplifying the OSS requirements in this way, the Commission will in large part avoid the burden of micromanaging OSS for all concerned.

Under the proposed Merger Conditions, SBC will most likely offer fully automated, electronic OSS functionality approximately six months before the entire Merger Conditions expire. Under the timeline of the three "Phases" of OSS development, SBC will develop a "uniform, application-to-application interface,"[65] which includes an Electronic Data Interface ("EDI"), approximately two-and-a-half years after the Closing Date.[66] The Merger Conditions now ensure expiration of all merger requirements no later than three years from the Closing Date.[67] In other words, CLECs will enjoy access to OSS interfaces that comply with Commission rules for a total of six months. This proposal is laughable.

Even absent the expiration date, the proposed Merger Conditions force CLECs to wait needlessly for access to proper OSS interfaces. As an initial step, the Merger Conditions give SBC up to five months from the closing date simply to draft a "Process Improvement Plan" for

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[65] Conditions ¶ 9.

[66] Conditions ¶¶ 9 & 11.a.

[67] Conditions ¶ 39.a.

existing SBC OSS.[68] Then the Merger Conditions propose a "workshop" at which the plan will be discussed with interested CLECs in hopes of obtaining CLEC approval.[69] This workshop will last one month unless, of course, the CLECs refuse to accept the plan, at which time the Common Carrier Bureau will intervene and determine whether arbitration of the plan is warranted.[70] If the plan goes into arbitration, the entire OSS timeline is thrown to the wind. Finally, once CLEC approval of the plan is obtained through the workshop or arbitration, SBC will develop and deploy its OSS interfaces "on a phased-in approach."[71]

SBC's proposed timelines for OSS development and deployment are grossly excessive. In effect, they start the OSS clock from zero, although the Commission has told SBC and Ameritech in the context of its Section 271 review process that the companies must deploy a real-time EDI interface for CLEC use.[72] Further, the Merger Conditions suggest that Ameritech already has an EDI system in place.[73] The extended development period that the Merger Conditions contemplate will force CLECs to wait literally years before obtaining access to fully automated, electronic OSS functionality. The Commission therefore should simplify and amend the proposed conditions to require SBC, with its vast combined resources, to provide CLECs with access to its best OSS functionality on or prior to the closing date. In addition, the Commission should require SBC to deploy EDI systems within six months of the closing date of the merger.

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[68] Conditions ¶ 11.a.

[69] Conditions ¶ 11.a.

[70] Conditions ¶ 11.b.

[71] Conditions ¶ 11.c. A similarly long timeline, having three Phases, is also included for a separate development of either a "software solution" to ensure systems compatibility with CLEC orders or, in the alternative, a set of business rules to govern submission of CLEC orders. Conditions ¶ 14.

[72] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket 97-137, FCC 97-298 ¶¶ 157-221; *Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd. 8685, 8711 (1997).

[73] *See* Conditions ¶ 16.c.

Finally, the Commission should include monetary sanctions, much like those already proposed,[74] to penalize SBC for failure to comply with its OSS obligations.

As important as the timeline for OSS provisioning are the Merger Conditions provisions regarding OSS automation. Under Paragraph 16 of the Merger Conditions, which deals explicitly with ordering and pre-ordering for data CLECs, until SBC develops fully automated EDI systems it will provide CLECs with access to Complex Product Service Ordering System (CPSOS) "for loop pre-qualification information" no later than six months after the closing date.[75] Connecticut and Nevada remain exempt from this requirement.[76] CLECs in Ameritech states will have access to Ameritech's existing EDI systems at some unspecified time.[77] These interfaces are necessary to provide crucial loop qualification information, which is discussed below.

Although CLECs must wait for CPSOS or its equivalent, SBC affiliates obtain access to this information immediately upon closing of the merger for a period of six months following the merger closing date.[78] In other words, nonaffiliated CLECs must wait not more than six months for an OSS functionality that their SBC affiliate competitors will already use. This inconsistency blatantly discriminates against data CLECs.

The Commission should therefore amend the OSS provisions in the proposed Merger Conditions to ensure simultaneous and equal access to the best OSS interface presently available from either SBC or Ameritech. The Merger Conditions should not permit SBC affiliates any time delay in obtaining OSS functionality in advance of any other CLEC. Rather, all CLECs

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[74] Paragraph 11.c. provides that SBC will pay "voluntary" payments of $100,000 per business day, up to a maximum of $10,000,000 for failure to deploy the interfaces required in this section.

[75] Conditions ¶ 16.a.

[76] *Id.*

[77] Conditions ¶ 16.a.

[78] Conditions ¶ 27.a.

must obtain OSS access on or prior to the closing date. In this way, the Commission can ensure a level playing field for CLECs both until and after SBC affiliate joins the advanced services market.

C. The Proposed Merger Conditions Include No Enforceable Requirement that SBC Implement the Commission's Collocation Rules

In March, the Commission issued a landmark set of rules in the *Advanced Services Order* that provide expansive and efficient access to collocation for CLECs. Implementation of these new rules has to date not occurred.[79] And under the proposed Merger Conditions, this situation is likely to persist in SBC territory for years.

The Merger Conditions require SBC to file in each state, prior to closing date, revised or original collocation tariffs "contain[ing] all terms and Merger Conditions necessary to bring SBC/Ameritech's provision of collocation into compliance with the Commission's governing rules."[80] These tariffs will not be filed at the Commission; the Commission will likely never see them in order to determine, with its own expertise, whether SBC have complied with the *Advanced Services Order*. Rather, the Merger Conditions provide at best for Commission review by proxy: an independent auditor, hired and funded by SBC, will provide Commission Staff with a report as to the content of SBC collocation tariffs within 10 months of closing date.[81] CLECs may not participate in this process to any degree. Thus, the Commission will not be able to verify SBC compliance with its collocation rules for at least one year, if not more. Commission enforcement action would not be possible for months after that time. Meanwhile, the clock

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[79] For example, Bell Atlantic has filed revised or original collocation tariffs in each of its states. Because these tariffs do not comport with the *Advanced Services Order*, many state commissions, largely due to the objections of DSL carriers such as Rhythms, have rejected or held these tariffs in abeyance. As a result, no CLEC in Bell Atlantic territory can obtain proper cageless collocation arrangements with twenty-four hour per day access as the Commission mandated almost four months ago.

[80] Conditions ¶ 4.

[81] Conditions ¶ 6 & 6.e.

on basic and advanced telecommunications competition is ticking and CLECs cannot obtain acceptable collocation terms and arrangements. These provisions are unacceptable.

The Commission has stated that "[c]ompetitive LECs rely on the incumbents to provision collocation space for the equipment needed to provide advanced services, and these new entrants cannot meet consumer demand for advanced services absent reasonable and nondiscriminatory collocation arrangements."[82] Recognizing the importance of collocation, the Commission adopted several rules mandating CLEC access to additional forms of collocation as well as defining appropriate equipment safety requirements and right of access. Under the proposed Merger Conditions, CLECs may never see the benefits of these rules.

In order to reify the *Advanced Services Order* that the Commission so diligently crafted, the Merger Conditions must provide for immediate guarantee of SBC compliance with the Order's mandates at both the state and federal levels. Accordingly, SBC must be directed to file state and federal collocation tariffs immediately that fully implement the Commission's collocation orders. CLECs must be permitted to participate in the review of SBC collocation offerings on an expedited basis. In addition, Commission enforcement must be specifically included, with regulatory penalties for SBC's failure to comply. Only with such clearly articulated Merger Conditions can the Commission ensure that CLECs obtain the access to collocation facilities that the *Advanced Services Order* promises them.

D. The Proposed Conditions Exacerbate Opportunities for Cross-Subsidization By Allowing the SBC Advanced Services Affiliates to Share Personnel, Offices And Other Resources With the SBC LECs

The proposed Merger Conditions for governing the SBC/affiliate relationship are loosely based on the model of Section 272 of the 1996 Act.[83] The Merger Conditions notably exclude

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[82] *Advanced Services Order* ¶ 21.

[83] 47 U.S.C. § 272 (1996).

incorporation of the most important aspects of Section 272, essentially gutting its ability to restrain the affiliate's leverage of its relationship with SBC against data CLEC competitors.[84] For example, the Merger Conditions omit from their separations requirements Section 272(d), which provides for biennial audit of affiliate operations by the Commission.[85]

The Merger Conditions further dilute the Commission's oversight ability by calling for the specific Merger Conditions to "trump" the statute "to the extent those provisions [in Section 272] are inconsistent with" the proposed Merger Conditions—irrespective of which is the more rigorous in defending the public interest.[86] Rather than mandating a code of conduct, the proposed Merger Conditions actually specify exemptions from the minimal rules otherwise available to prevent anticompetitive SBC/affiliate transactions. The Commission cannot circumvent the statutory requirements of Section 272 in complete disregard of the public interest.

The scant accounting controls provided by the proposed Merger Conditions are insufficient to prevent cross subsidies from flowing between the regulated LEC business and the advanced services affiliate. The Merger Conditions specifically allow for "[e]mployees of the separate Advanced Services affiliate(s) [to] be located within the same building and on the same floors as employees of the incumbent LECs."[87] No reference to market rent rates, or process to verify the accuracy of such rate, is indicated. Neither is there mention of imputation of this (or, in fact, any other costs)—a basic tenet of restricting affiliate transactions.

There does not appear to be any continuing reporting due to the Commission, (or to the state commissions), with respect to affiliate transactions. In contrast, incumbent LEC charges for operations, installation and maintenance services are allowed without examining the rate for such

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[84] The Conditions omit inclusion of the requirements of Section 272 (a), (d) and (f). *See* Conditions ¶ 27.

[85] 47 U.S.C. § 272(d).

[86] Conditions ¶ 27.a.

[87] *See* ¶ 27.e.

services, subject only to public disclosure either by establishing the rates in a tariff or within the LEC/affiliate interconnection agreement.[88] Underlying this is the implication that competitors will be able to assure compliance by requesting the service tariffed or opting-in to the LEC/affiliate interconnection agreement. Reliance on CLEC-generated complaints attempts to constrain the power of the Commission to assure compliance with accounting safeguards. In effect, the Commission is relegated to reacting to problems rather than proactively preventing them from occurring.

In order to ensure true separation between the LEC and its affiliate(s), the Commission should require regular reporting of affiliate transactions and make such filings publicly available. At a minimum, the Commission should reinstate the biennial audit requirements otherwise available to itself and state commissions under Section 272(d).

CONCLUSION

SBC has crafted a set of proposed Conditions with massive, unacceptable loopholes that completely undermine the purposes of Section 272 of the Act. This SBC effort to emasculate corporate separation is directly inconsistent with its contention that the conditions make the proposed SBC/Ameritech merger in the public interest. If it approves the merger, the Commission can only do so by rejecting SBC's proposal and adopting alternative conditions, such as those

[88] *See* ¶ 27.b.

prepared by Rhythms, that properly implement the structural separation mandates of Section 272 in the context of the broadband advanced services marketplace

Respectfully submitted,

RHYTHMS NETCONNECTIONS INC.

By: _____
Glenn B. Manishin
Christy C. Kunin
Stephanie A. Joyce
James R.J. Scheltema
Blumenfeld & Cohen – Technology Law Group
1615 M Street, N.W., Suite 700
Washington, D.C. 20036
202.955.6300
202.955.6460 fax
<glenn@technologylaw.com>

Jeffrey Blumenfeld
Vice President and General Counsel
Rhythms NetConnections Inc.
6933 South Revere Parkway
Englewood, CO 80112
303.476.2222
303.476.5700 fax
<jeffb@rhythms.net>

Dated: July 19, 1999

ATTACHMENT 1

PROPOSED ALTERNATIVE CONDITIONS

APPENDIX A
PROPOSED CONDITIONS TO FCC ORDER APPROVING
SBC/AMERITECH MERGER

[Replace the first paragraph as follows:]

As a condition to receiving approval for this proposed merger, SBC and Ameritech shall comply with the following enumerated Conditions. For the purposes of these Conditions, the term "Merger Closing Date" means the day on which, pursuant to their Merger Agreement, SBC and Ameritech cause a Certificate of Merger to be executed, acknowledged, and filed with the Secretary of State of Delaware as provided in Section 251 of the Delaware General Corporation Law, as amended. The conditions described herein shall be null and void if SBC and Ameritech do not merge and there is no Merger Closing Date.

* * * * *

II. Collocation Implementation Requirements

[Replace paragraphs 3-7 as follows:]

X. In the 13-state service area where its subsidiaries operate as incumbent LECs ("the SBC/Ameritech States"), SBC/Ameritech shall provide collocation facilities in full compliance with governing Commission rules, including the Commission's First Report and Order in CC Docket No. 98-147, FCC 99-48 (released March 31, 1999) ("*Collocation and Advanced Services Order*").

X. Prior to the Merger Closing Date, SBC/Ameritech shall file revisions to its existing state collocation tariffs in each of its States.

X. Prior to the Merger Closing Date, SBC/Ameritech shall file a federal collocation tariff that will govern collocation arrangements within its 13-state region.

X. Prior to the Merger Closing Date, SBC/Ameritech must appoint and receive Commission approval of an independent auditor to review each state and federal tariff filed by SBC/Ameritech in compliance with these Conditions. The independent auditor shall not have been involved in designing any systems for SBC or Ameritech that will be reviewed in the audit.

a. Not later than two months after the Closing Date, the auditor will provide to the Commission's Audit Staff a report on the collocation offerings included in SBC/Ameritech state and federal revised collocation tariffs.

b. The auditor will revise and update this report as appropriate every sixth months following the initial submission of the report.

X. Nothing in these Conditions prohibits CLECs from instituting State Commission or FCC review of the filed tariffs on an expedited basis.

* * *

VI. xDSL and Advanced Services Deployment

* * *

[Replace paragraphs 21-24 as follows:]

X. SBC/Ameritech will provide, on or before the Closing Date, all unaffiliated CLECs with nondiscriminatory access to all loop information that SBC and/or Ameritech presently use for their own retail services.

a. The required loop information shall include, for all loops on an individual basis, the following data: (1) exact loop length; (2) loop gauge; (3) presence of load coils, repeaters, bridged taps and digitally added main lines ("DAMLs"); and (4) whether any portion of the loop is served by digital loop carrier, and if so, whether alternative copper is available to provision around DSL;

b. This loop information will be available via the electronic interfaces, including but not necessarily limited to those presently used by SBC and/or Ameritech.

b. This loop information will be available through non-electronic means as required by any CLEC.

c. SBC/Ameritech will provide all loop information at the pre-order stage of xDSL provisioning.

X. In any of its states in which xDSL loop rates have not been formally approved, SBC/Ameritech shall set a rate for its xDSL-capable loops that is no greater than the rates charges for 2-wire analog voice grade loops.

X. SBC/Ameritech shall not impose, on a recurring or non-recurring basis, charges for the removal of load coils, repeaters, bridged taps or DAMLs as required by the CLEC to provide advanced services over the loop.

VII. Structural Separation for Advanced Services

[Replace paragraph 25 as follows:]

X. SBC/Ameritech shall provide Advanced Services only through one or more CLEC affiliate(s) in accordance with the provisions set forth below. As described below, Ameritech and SBC shall establish separate Advanced Services CLEC affiliates as a precondition to approval of this merger. The establishment of such CLEC affiliate(s) is deemed completed upon: (1) receipt of state approval of the CLEC's Certificate of Public Convenience and

Necessity (or the equivalent thereof); (2) receipt of state approval of the CLEC's fully executed interconnection agreements with SBC/Ameritech in every SBC/Ameritech state in which the CLEC will do business within a period of two years of the Closing Date; and (3) completion by the affiliate of all operations necessary for the provision of advanced services.

[Replace paragraphs 27-28 and 30-40 as follows:]

X. SBC/Ameritech and its CLEC affiliate(s) shall remain fully separate according to the guidelines set forth in Section 272 of the Communications Act. These guidelines include, *inter alia*:

a. SBC/Ameritech may not share employees with its affiliate(s) for the purposes of operations, sales, maintenance and installation of advanced services.

b. SBC/Ameritech and its affiliate(s) may not occupy space within the same office buildings presently occupied by SBC or Ameritech.

c. SBC/Ameritech may not engage in joint marketing with its affiliate(s).

d. SBC/Ameritech must operate independently from its affiliate(s) for all purposes, including:

(1) maintenance of separate accounting, books and records

(2) separate officers and directors

(3) affiliate(s) may not obtain credit under any arrangement that would permit a creditor of the affiliate to have recourse to SBC/Ameritech funds

(4) conducting all orders and transactions on an arm's length basis with any such transactions reduced to writing and available for public inspection

(5) ownership of all facilities used exclusively for the provision of advanced services

e. SBC/Ameritech may not offer, lease or provide to its affiliate(s) any facilities necessary to provide advanced services at rates, terms or conditions that are more favorable than the terms at which SBC/Ameritech offers such facilities to non-affiliated CLECs, unless such terms are executed in an approved interconnection agreement that is available for public review.

(1) SBC/Ameritech must permit non-affiliated CLECs to pick-and-choose or adopt via most-favored-nation status the same rates, terms, and conditions. 47 C.F.R. § 51.809.

(2) For purposes of this section, the term "facilities" includes access to comprehensive information regarding loops that non-affiliated CLECs may lease for the purpose of providing advanced services.

(3) SBC/Ameritech must offer line sharing to all requesting CLECs by the earliest date of:

(i) Merger Closing Date;

(ii) Commission issuance of a line sharing mandate in CC Docket 98-147, Deployment of Advanced Wireline Services Offering Advanced Telecommunications Capability; or

(iii) Commission issuance of a line sharing mandate in CC Docket 96-98, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996.

CERTIFICATE OF SERVICE

I, Leslie LaRose, do hereby certify that on this 19th day of July, 1999, I have served a copy of the foregoing document via * messenger and U.S. Mail, postage pre-paid, to the following:

_____
Leslie LaRose

*Chairman William E. Kennard
Federal Communications Commission
445 12th Street, S.W., Room 8B-201
Washington, D.C. 20554

*Commissioner Susan Ness
Federal Communications Commission
445 12th Street, S.W., Room 8B-115
Washington, D.C. 20554

*Commissioner Harold Furchtgott-Roth
Federal Communications Commission
445 12th Street, S.W., Room 8A-302
Washington, D.C. 20554

*Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W., Room 8C-302
Washington, D.C. 20554

*Commissioner Michael Powell
Federal Communications Commission
445 12th Street, S.W., Room 8A-204
Washington, D.C. 20554

*Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5C-450
Washington, D.C. 20554

*Dorothy Atwood
Legal Advisor to Chairman Kennard
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8B-201
Washington, D.C. 20554

*Linda Kinney
Legal Advisor to Commissioner Ness
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8B-115
Washington, D.C. 20554

*William Bailey
Legal Advisor to Commissioner
Furchtgott-Roth
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8A-302
Washington, D.C. 20554

*Kyle Dixon
Legal Advisor to Commissioner Powell
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8C-302
Washington, D.C. 20554

*Robert Atkinson
Deputy Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C356
Washington, D.C. 20554

*ITS
1231 20th Street, N.W.
Washington, D.C. 20036

Paul K. Mancini
General Attorney and Asst. General Counsel
SBC Communications Inc.
175 E. Houston Street
San Antonio, TX 78205

*Sarah Whitesell
Legal Advisor to Commissioner Tristani
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 8A-204
Washington, D.C. 20554

*Kathy Brown
Chief of Staff
Federal Communications Commission
445 12th Street, S.W., Room 8B-201
Washington, D.C. 20554

*Janice M. Myles
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., Room 5-C327
Washington, D.C. 20554

Richard Hetke
Senior Counsel
Ameritech Corporation
30 South Wacker Street
39th Floor
Chicago, IL 60606